Nos. 86-569 and 86-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 602(a)(38) authorize state officials to require non-needy children to become welfare recipients and to forfeit their child support in order for their custodial parents and indigent siblings to receive Aid to Families with Dependent Children?

2. If 42 U.S.C. § 602(a)(38) does authorize such action on the part of the state officials, is such a procedure unconstitutional?

3. Where state officials knowingly and deliberately violate a valid federal injunction, does the Eleventh Amendment preclude the federal courts from ordering state officials to return funds improperly taken or

withheld in violation of that injunction?

4. Should Hans v. Louisiana, 134 U.S. 1 (1890), be overruled?

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STATEMENT OF THE CASE

This case originated in 1970 as a challenge to a North Carolina practice of improperly imputing income to recipients of Aid to Families with Dependent Children (AFDC). At the time, North Carolina automatically included all children living in a household as members of an AFDC assistance unit if an application was made for any of the children. This was true even when a particular child received adequate child support from his absent parent. The whole family's grant was reduced by the child support belonging to just one family member. A three-judge court held that to treat child support paid for a specific child as a resource available to the entire family worked an unlawful appropriation of the funds of the supporting parent and the recipient child, in violation of the intent of the

Social Security Act and constitutional principles. Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971). A permanent injunction was entered, prohibiting North Carolina from directly or indirectly reducing AFDC payments to eligible children by the amount of legally-restricted child support income received by other children in the household. North Carolina Jurisdictional Statement. A-108 to A-114, (hereinafter N.C.J.S.). This Court affirmed that order. 409 U.S. 807 (1972).

In July, 1984, Congress enacted the Deficit Reduction Act of 1984 (DEFRA), which contained an amendment to the Social Security Act regarding the treatment of AFDC recipients who shared a home with siblings not receiving AFDC. Pub. L. No. 98-369, § 2640(a), 98 Stat. 1145, 42 U.S.C. (Supp. III) § 602(a)(38). The Department of Health and Human

Services interpreted section 602(a)(38) to require termination of AFDC to such recipients unless these non-recipient siblings were also added to the welfare rolls. 45 C.F.R. §206.10(a)(1)(vii). Once drawn into AFDC, their separate income was counted as available to the whole group and any child support payments were required to be assigned to the state. 45 C.F.R. § 232.11. North Carolina officials, although aware that this interpretation of section 602(a)(38) conflicted with their obligations under the 1971 injunction, did not return to court to seek a modification of that order. (N.C.J.S. A-78). Instead, in October, 1984, the state officials began systematically to violate the 1971 decree.

In May, 1985, a group of class members injured by that violation submitted to the district court a request

for further relief. (J.App. 30-34). North Carolina then filed a third-party complaint against Secretary Bowen, claiming that the state's actions were required by the new HHS regulations. (J.App. 66-72). The district court upheld the disputed HHS regulations as consistent with section 602(a)(38), but held the statute and regulation unconstitutional as applied to child support recipients, and enjoined their enforcement. (N.C.J.S. A-1 to A-80). The district court also concluded that North Carolina officials had knowingly violated the outstanding 1971 injunction, and directed those officials to return all funds seized or withheld in violation of that earlier decree. (N.C.J.S. A-78 to A-80). The district court stayed its order pending appeal. (N.C.J.S. A-148). Both the federal and state defendants

appealed; on December 8, 1986, this Court noted probable jurisdiction.

STATEMENT OF THE FACTS

In October, 1984, North Carolina notified all AFDC recipients who lived with non-AFDC siblings that their AFDC grants would be terminated unless they reapplied for AFDC and agreed to put those siblings on public assistance. Prior to that date, for example, Dianne Thomas and her daugher Crystal had been receiving a monthly AFDC grant of $194 because Crystal's father paid no child support. Ms. Thomas had not requested assistance for her son Sherrod, however, because he was adequately supported by a $200 monthly support payment from Sherrod's father. Ms. Thomas was told that she could not receive AFDC for herself and Crystal unless Sherrod also went on welfare. (N.C.J.S. A-14). When Ms. Thomas and other AFDC parents

submitted the required application, they were also told that all aid would be denied unless they assigned to the state the support payment of the non-indigent child. (N.C.J.S. A-16). The state retained most of each support payment, providing the applicants with a small additional grant for the non-indigent applicant, plus in most instances a statutory $50 pass through.[1] The actual additional grant for a child such as Sherrod Thomas was $29 (Table 4 J. App. 52).

The appellants' practice of mandating participation in AFDC by non-needy siblings had two immediate consequences. First, approximately 15%

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[1] 42 U.S.C. § 657(b)(1) requires the child support enforcement agency to pass through to the family the first $50 paid in child support in a particular month. 42 U.S.C. § 602(a)(8)(A)(vi) requires the AFDC program to disregard this $50 in calculating the family's income.

of the affected AFDC recipients were terminated from the North Carolina AFDC program from 1984 through 1986 because state officials calculated that the support payments to their siblings were sufficient to support the entire family. Second, in about 85% of the cases a child with independent support was conscripted onto the rolls and his child support was taken by the state. See lists of Class Members filed Dec. 11, 1986, J. App. 16. State officials then disbursed for that child an additional AFDC allotment which was substantially less than the amount the state had actually received. Prior to October, 1984, for example, Diane Jefferys was receiving $204 a month in child support for two of her children, Latoya and Anthony, who were not on AFDC; after Ms. Jefferys complied with the state's direction to put both children on AFDC, the state received the $204 each

month, but disbursed for the children only an additional $71. After passing through the $50 disregard, the state retained the balance of $83 to help defray the overall cost of the AFDC program. (N.C.J.S. A-29). Similarly, in August, 1985, North Carolina received a check for $810 to cover several months of accumulated support payments for two children of Arvis Waters; state officials actually disbursed to Ms. Waters only $50 of that amount, and retained the remaining $760. (N.C.J.S. A-27)

This practice of expropriating most of the child support payments involved several direct and foreseeable consequences. First, of course, it drastically lowered the standard of living of the supported children whose support payments were partially expropriated by the state. The money available for Latoya and Anthony

Jefferys, for example, immediately fell by more than half. Ms. Jefferys and her children were soon evicted from their house, and Ms. Jefferys was unable to buy either clothes or shoes for children who had had both prior to 1984. (J. App. 134-135). Other supported children suffered in a similar manner because the state was seizing a substantial portion of their support funds. (N.C.J.S. A-13 to A-30). The state retains on average $50 to $100 from each monthly child support payment, one third to one half of each such payment.[2] Having been thus conscripted onto the AFDC rolls, the

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[2] See N.C.J.S. A-14 (monthly support payment of $200; net additional allotment of $29 plus $50 pass-through); A-21 to A-22 (monthly support payment of $189; net additional allotment of $44 plus $50 pass-through; A-23 to A-24 (monthly support payment of $190; net additional allotment of $44); A-28 to A-29 (monthly support payment of $204; net additional allotment of $36 plus $50 pass-through); cf. J. App. 109 (average "reduction" of $103).

formerly self-sufficient children were forced to subsist on grants equal to about 30% of the federal poverty level.[3]

Second, once the fathers of the supported children learned that most of the support payments were actually going to the Department of Human Resources, rather than to their own children, many of them terminated or reduced those payments. The father of Latoya and Anthony Jefferys stopped making support payments several months after the assignment began, because, Ms. Jefferys reported, "he feels like when he pays, his children do not really benefit." (N.C.J.S. A-29). State officials were evidently unable to bring about a resumption of those support payments. The father of Sherrod Thomas had

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[3] Compare table 4, J.App. 52 (North Carolina payment standard) with 50 Fed. Reg. 9517-18 (March 8, 1985) (federal poverty guidelines).

regularly and voluntarily been paying $200 a month for the child's support, but ceased making those payments as soon as they were assigned to the state; subsequently state officials were able to induce the father to resume support payments, payable to the state, of $87 a month. (N.C.J.S. A-16 to A-17; see also id. at A-20, A-68 to A-73).

A state judge explained that as a practical matter North Carolina courts have few effective tools for compelling an unwilling father to make support payments, since garnishment of a father's wages frequently results in his dismissal, and imprisonment "rarely results in income for the family." (N.C.J.S. A-53). Cf. Linda R.S. v. Richard D., 410 U.S. 614 (1973). Prior to 1984, the most effective judicial tool for inducing fathers to make support payments was emphasizing the importance

of keeping the child at issue off the public assistance rolls. (N.C.J.S. A-72 to A-73). The judge explained that she expected "to continue hearing father's refusals to pay child support when they learn that their child support is being paid to the Department of Human Resources instead of to their children, and when they discover that their child is on welfare even though they are paying support regularly." (N.C.J.S. A-72).[4]

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[4] The district court in Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986), appeal pending, No. 86-1101 (3d Cir.) found the disputed practices,

> reduce the incentive a father might have to provide child support willingly. The sibling deeming rules will increase the unwillingness of fathers to pay child support because payments by the father will not have demonstrable benefits to the child, and because the child support payments will be subsidizing other members of the household. The sibling deeming rules will result in increased resistance to paying child support.

Third, the disputed practices poisoned in a variety of ways relations among the family members involved. Non-custodial fathers ready and willing to support their children were predictably angered to learn that they were effectively forbidden to do so because the mother, having had one or more children by another less responsible man, was seeking AFDC for those other children. (N.C.J.S. A-14, A-71). Because the mandatory assignment terminated the normal support relationships between the non-custodial parent and the child, some of those parents reduced or ended their non-financial relationship with the children, in turn inducing emotional problems among the children. (N.C.J.S. A-17). Some custodial parents have surrendered custody of supported children in order to avoid seizure of the children's support

funds. (N.C.J.S. A-19).

Finally, the state officials have moved aggressively to prevent non-custodial parents from providing in-kind support which the state cannot effectively seize and profit from. After the birth of his son Jermaine, for example, James Richardson regularly provided the child with food, clothing and diapers, and paid directly some of the related household bills. When Richardson refused to agree instead to pay the state $165 a month, of which only $50 would go to Jermaine, he was prosecuted for criminal non-support. (N.C.J.S. A-20). Similarly, Rick Staples was directly providing to his child Kristen clothing, food, furniture, medicine and other needed items. After Kristen's child support rights were assigned by the child's mother as a condition of her receipt of AFDC for two

other children, state officials brought a civil action against Staples to enjoin him from continuing to provide such in-kind assistance to his daughter. The Wake County district court judge found that it would not be in Kristen's best interest for the father to pay monetary support rather than purchase necessities directly and denied the agency's complaint. Wake County, ex rel. Carol Fleming v. Rick Staples, 86 CVD 4461 (Wake County) (Oct. 1, 1986) appeal dismissed, 86 10DC1351 (N.C.Ct. App., Feb. 2, 1987).

SUMMARY OF ARGUMENT

(1) Section 602(a)(38), as the government construes it, requires as a condition of ADFC eligibility that an applicant's non-needy siblings also go on welfare, and forfeit to the state any child support payments. The actual language of section 602(a)(38), however,

makes no reference to requiring anyone to actually apply for or receive public assistance. Rather, the statute simply mandates that an adjustment be made in "the determination" of the size of the grant to those individuals who actually desire AFDC assistance.

The history of the statute does not contain, as the Solicitor suggests, "legislative findings that family members who live in the same household pool their resources." (U.S. Br. 41). Section 602(a)(38), unlike the statute in Lyng v. Castillo, 91 L.Ed.2d 527 (1986), was not preceded by or based on any congressional hearings regarding the actual practices of AFDC recipients. The legislative history of section 602(a)(38) suggests, at most, that Congress intended to require the states to "take into consideration" the extent to which the income of non-AFDC children was in fact

reducing the net needs of AFDC recipients with whom they lived.

The HHS regulations effectively strip state judges of the power to direct a child support payment to a specific child if he or she resides in a household with AFDC recipients. The regulations have the practical effect of converting any such state decree into an award to the entire family, despite the intent of the state court and despite the fact that state law does not permit child support funds to be used for others in the household. Neither the language nor the legislative history of section 602(a)(38) indicate an intent to pre-empt state domestic relations law in this way.

(2) This is not, as was true in Lyng, simply a case in which aid recipients are complaining that the amount of their benefits has been reduced. Indeed, in most instances, the

HHS regulations actually result in a small increase in the AFDC grant. The issue here, rather, is whether the HHS regulations attach an unconstitutional condition to the receipt of that aid. Cf. Hobbie v. Unemployment Appeals Commission, (No. 85-993, Feb. 25, 1987). In this case a custodial parent seeking AFDC is required to turn over to the state the child support payments for her non-needy children, even though those children neither want nor need AFDC. North Carolina turns a substantial net profit by thus conscripting supported children into AFDC, paying out in additional benefits for those children several million dollars less than the total amount of support funds which the state receives for them.

The government's practices constitute a taking of private property without just compensation. The child

support payments diverted to and retained by the state are undeniably the private property of the supported child. In diverting those funds to the government rather than spending them on the designated child, the mother acts at the behest and on behalf of the state. The consequences of a loss of AFDC to her other children are so catastrophic that the mother has no choice but to act as an agent of the state and make the demanded assignment; the child on whom the funds should have been spent literally has no choice in the matter.

The Solicitor argues that the amount of each child's support funds thus expropriated is "not so great as to effect a taking." (U.S.Br. 37). But the amount of money taken is of enormous importance to the comparatively poor individuals affected. The government asserts that no taking has occurred

because the incremental grant paid for each affected child, although less than the amount seized, nonetheless "reflects the needs of the child." (U.S.Br. 39). The Taking Clause, however, does not permit the government to take from each according to his ability, merely because it purports to provide to each according to his needs.

(3) The actions of the state appellants violated a 1971 injunction which had been affirmed by this Court. Craig v. Gilliard, 409 U.S. 807 (1972). The district court concluded that the state officials knew that their conduct was forbidden by the terms of the 1971 order. (N.C.J.S. A-78, A-79).

The state appellants argue that the 1984 adoption of section 602(a)(38) removed the legal basis on which the 1971 injunction rested. These appellants now assert that the 1971 opinion relied

solely on the Social Security Act as it was then written; in their 1972 appeal to this Court, however, the state appellants insisted that the 1971 opinion rested on constitutional grounds. If the state officials believed that the enactment of section 602(a)(38) did undercut the basis of the 1971 injunction, they were obligated to obey that injunction until it was modified by the court. Walker v. City of Birmingham, 388 U.S. 307 (1967).

The state appellants assert that, even if they knowingly violated the 1971 injunction, the Eleventh Amendment precludes the district court from directing a refund of money seized or withheld in violation of that decree. "Federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." Hutto v. Finney, 437 U.S. 678 (1978).

The remedial order of the district court simply enforces the prospective 1971 injunction by requiring state officials to do today what the 1971 injunction required to be done in 1984-86.

I. THE APPELLANTS' PRACTICES ARE FORBIDDEN BY THE SOCIAL SECURITY ACT

Congress enacted section 602(a)(38) to require that where a parent and child receiving AFDC live together with a child receiving income such as child support payments, the AFDC grant to the parent and indigent child would be adjusted to take into account the economic benefits which those AFDC recipients receive as a result of the presence of that non-AFDC child. The statutory issue presented by this case concerns the nature of the adjustment which is authorized by section 602(a)(38). The actual language of section 602(a)(38), like much of the Social Security Act, is "almost unintelligible to the uninitiated."

Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). To understand the meaning of that section, it is necessary to begin with the statutory scheme onto which it was engrafted, and the state of the law prior to 1984.

(1) The states participating in the AFDC program are given discretion in determining the size of the grants they will make, subject to certain limitations embodied in the Social Security Act and the applicable regulations.

Generally, a state must begin with a "standard of need."[5] This is the amount which the state determines is necessary to meet essential needs; the level generally varies with the number of individuals in the household, on the theory that those who are part of the

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5 The state standard of need is referred to in several parts of the statute. See 42 U.S.C. §§ 602(a)(17), 602(a)(18), 602(a)(23), 602(a)(31).

same household experience certain economy of scale savings. Cf. Lyng v. Castillo, 91 L.Ed.2d 534-35. A state cannot alter its standard of need merely to lower the benefit to be paid; the state may choose to make actual grants too small to meet the standard of need, but it cannot achieve or obscure that result by doctoring the standard of need itself. Cf. Rosado v. Wyman, 397 U.S. 397, 413-14 (1970).

Second, a state computes the countable income of each applicant. This computation is subject to the "actual availability principle," which precludes a state "from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need." Heckler v. Turner, 84 L.Ed.2d 138, 150 (1985). The most important application of this principle is to bar states from reducing or denying benefits

on the theory that an applicant is receiving presumed but non-existent income from another person in the household. King v. Smith, 392 U.S. 309 (1968); Van Lare v. Hurley, 421 U.S. 338 (1975). In some instances, however, Congress has created an express exception to the principle, permitting a state to "deem" available to an AFDC applicant a specified portion of the income of another party, regardless of whether it is in fact received. The amount "deemed" available is determined by subtracting from the third party's income that party's own standard of need, and making certain other adjustments. 42 U.S.C. § 602(a)(39) (grandparents), § 602(a)(31) (stepparents); § 615 (alien sponsors). Cf. Schweiker v. Gray Panthers, 453 U.S. 34 (1981) (spouses).

Third, having computed a countable income for the applicants, the state

calculates the grant amount. The Social Security Act does not mandate a particular method of calculation. Jefferson v. Hackney, 406 U.S. 535 (1972). For example, the state may pay a specified percentage of the difference between the countable income and the applicants' needs. Rosado v.Wyman, 397 U.S. at 409 and n. 13. Alternately, the state might choose to set a maximum on the size of the grant, regardless of the applicants' needs. Dandridge v. Williams, 397 U.S. 471 (1970). Or, like North Carolina, a state may apply a percentage reduction to the standard of need, and then subtract countable income from that figure. (J. App. 77-78).

Prior to 1984, states participating in the AFDC program did not as a general practice take into consideration how the need and income of an applicant might be affected by the presence in the home of a

child who was not seeking AFDC because he or she had a separate source of income such as child support. Section 602(a)(38) was enacted to require the states to make an adjustment in their AFDC grants because of the presence of such children; what that adjustment was to be remains in dispute.

(2) Section 602(a)(7) provides that, "in determining [the] need" of an AFDC applicant, a state "shall take into consideration any ... income" of the applicant or certain other individuals. Section 602(a)(38) states in pertinent part that

> in making the determination under paragraph (7) with respect to a dependent child ... the State agency shall ... include
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> * * *
>
> (B) any brother or sister of such child ... if such ... brother, or sister is living in the same home as the dependent child, and any income of or available for such ... brother,

> or sister shall be included in making such determination ....

Section 602(a)(7) and 602(a)(38), read together, require that, in determining the need of the parent and indigent child or children applying for AFDC, the state will "include" any children who may not be seeking AFDC, and "take into consideration" the income of those children. Section 602(a)(38) clearly requires that some sort of adjustment be made in an AFDC grant when there are supported children in a household, but the statutory language itself provides little guidance as to what that adjustment is to be.

Here, as has occurred before in other contexts, section 602(a)(38) was framed in the sort of opaque language that so often facilitates the legislative process but complicates the work of the judicial branch. Although the vague language of section 602(a)(38) is

susceptible of several quite different interpretations, each of those alternatives is itself quite simple. Either the Administration, which originally proposed this amendment, or the Senate Finance Committee, which first approved it, could readily have framed a statute or explanation free of ambiguity, but they chose not to do so. In the face of this studied opacity one cannot assume that the framers of section 602(a)(38) intended to reject any of the benefit adjustment methods set forth with greater specificity in other parts of the Social Security Act; the only thing which the framers of section 602(a)(38) clearly rejected was clarity itself.

(3) The Solicitor General argues, however, that the purpose of section 602(a)(38) was not to alter the method of calculating the grants for individuals who actually wanted AFDC assistance.

Rather, he asserts, Congress enacted section 602(a)(38) to require, as a condition of AFDC assistance to a needy child, that all the child's siblings be put on AFDC, including children who neither wanted nor needed government aid, and that all the child support payments of those conscripted siblings be assigned to the government. The effect of the HHS regulations implementing this view has been to add several hundred thousand unwilling participants to the AFDC rolls.

The language of section 602(a)(38) is difficult to reconcile with the Solicitor's proposed interpretation. Section 602(a)(38) contains no language suggesting that supported children or anyone else must apply for AFDC, or live on welfare rather than rely on support from a non-custodial parent. Indeed, section 602(a)(38), unlike other

provisions of the statute,[6] does not impose any obligations at all on AFDC applicants themselves; the commands of section 602(a)(38) are directed solely at the state AFDC officials calculating the size of the grant to be awarded to actual applicants. Section 602(a)(26), which requires the assignment of child support funds, is expressly applicable only to an "applicant or recipient;" a member of Congress familiar with section 602(a)(26) would have had no reason to think that 602(a)(38) would extend that mandatory assignment provision to children who neither wanted nor needed AFDC.

If Congress had intended actually to

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[6] See, e.g., 42 U.S.C. §§ 602(a)(14) (recipients required to submit reports), 602(a)(19)(A) (certain recipients required to register for employment-related activities); 602(a)(26)(B) (recipients required to assist state in establishing paternity of children born out of wedlock), 602(a)(35) (state may require recipients to look for work).

require that supported children go on the AFDC rolls, it certainly knew how to do so. The Food Stamp Amendments of 1982, enacted the same year that section 602(a)(38) was first proposed, expressly contained just such a requirement. The Food Stamp Program provides funds, not to individuals, but to "households" whose composition is specified by statute. An application must be made on behalf of a "household;" thereafter it is the statutorily defined "household" whose needs and income are considered, and to whom the foods stamps are allotted. 7 U.S.C. §§ 2013 et seq. In 1982, when Congress redefined the Food Stamp household to encompass siblings, that statutory change clearly mandated that such siblings apply for and comply with the provisions of the Food Stamp program. Cf. Lyng v. Castillo, 91 L.Ed.2d at 532 n. 1. AFDC, on the other hand, remains

as it was prior to 1984 a statutory scheme which focuses on individuals. Requests for AFDC are made, not by a statutorily defined entity, such as a "household," but by "individuals wishing to make application for aid." Compare 7 U.S.C. § 2020(e)(2) with 42 U.S.C. § 602(a)(10)(A). Thus the 1984 AFDC legislation clearly did not compel participation in that program by individuals who did not wish such assistance.

The legislative history of section 602(a)(38) provides no support for the government's interpretation of the statute. The Solicitor does not suggest that any member of Congress ever actually said that additional children would be required to go on AFDC, or that support payments for children who did not want AFDC would be assigned to the government. For years critics of AFDC had argued that

the very status of being on welfare had a debilitating effect on the morale and aspirations of children; surely one of these critics would have spoken out if it were understood that section 602(a)(38) would require placing on the welfare rolls several hundred thousand children who were then being supported directly by their own parents. At the time when DEFRA was adopted, the overriding issue dividing Congress was whether the deficit should be cut through reductions in spending or increases in taxes. Section 602(a)(38) as the Solicitor construes it, was intended literally to take $150 million a year from fathers and children not then on AFDC, and funnel it back through the states to the federal government. Had it been generally understood that this was to be the effect of section 602(a)(38), it seems likely that someone would have objected that it

had all the trappings of an extraordinarily retrogressive tax.

The Solicitor bases his statutory argument on an assertion that there were "legislative findings that family members who live in the same household pool their resources" (U.S. Br. 41), but this enticing assertion is not accompanied by any reference to the phrase "pool their resources" in the legislative history. Elsewhere in his brief the Solicitor describes these purported findings in very different terms, suggesting variously, that Congress found that such indigent families "share":

- "the expense of common necessities" (U.S. Br. 20)
- "the cost of obtaining life's necessities" (U.S. Br. 21)
- "expenses" (U.S. Br. 10, 41)
- "resources" (U.S. Br. 29, 41)
- "income" (U.S. Br. 10, 41)

These quite different "findings" would

support very different interpretations of the statute. If Congress acted on a finding that such families share the "expense of common necessities," such as rent and utilities, it presumably contemplated only an economy of scale adjustment based on the lower per capita cost of those common needs. Attempting to escape the palpable distinction between the sharing of certain common expenses and a pooling of all income, the Solicitor asserts that not only shelter and utilities, but also "transportation and clothing ... are ordinarily regarded as shared expenses." (U.S. Br. 33). If a mother were to spend $10 on diapers for an infant son, a dress for a young daughter, or a blouse for herself, it would be strange indeed to describe that expenditure as meeting a "shared expense" of all three. Similarly, for the majority of AFDC recipients who travel on

public transportation, the fares involved, unlike the cars of more affluent families, are not a shared expense.

(4) The Solicitor General urges the Court to apply to the disputed HHS regulations the deference usually accorded an agency responsible for administering a statute. (U.S. Br. 24). That deference is appropriate in the ordinary case in which the agency at issue not only has relevant technical expertise, but also agrees with the purposes and priorities that prompted Congress to enact the underlying statute. But there are some instances in which such agreement does not in fact exist. The very independence of the executive and legislative branches guarantees that there will be important, deeply felt differences regarding federal policies; such differences will inevitably mean

that Congress will at times adopt legislation opposed by executive officials, or will reject in whole or part administration legislative initiatives. The courts, in determining the significance of an agency's interpretation of a statute, must as a general rule bear in mind the possible existence of such differences.

Caution is particularly appropriate in construing legislation framed by the executive branch and enacted by a reluctant Congress. Such legislation necessarily represents a compromise of the differing policies and priorities which animate the two branches of government involved. Because of those differences, such a statute, like a contract drafted by one of two parties with adversarial interests, must be construed to embody only those concessions to administration policy

which Congress would clearly have understood it was making. It is vital to the integrity of the legislative process that executive agencies not be permitted to give to a statute, after enactment, an interpretation more favorable to the administration's perspective than the construction clearly offered by the agency when the legislation was still before Congress.

During the years immediately preceding the enactment of DEFRA, the most consistent and heated differences between Congress and the executive branch concerned the level of benefits to be provided to the indigent under various social welfare programs. The administration strongly favored reducing the deficit by cutting such social welfare spending, while Congress often objected to placing the burden of deficit reduction on the less affluent Americans

who depended on federal aid. The debate over proposals to reduce AFDC benefits to households with supported children was not an isolated skirmish, but part of a wide-ranging and continuing struggle, rooted in fundamental differences regarding economic and fiscal policy.

For two and a half years officials of the executive branch lobbied a reluctant Congress to reduce AFDC benefits for recipients in households that included supported children. Executive branch officials proposed statutory language which contained no reference to requiring that supported children be placed on AFDC, and no reference to requiring assignments of the support payments of children who did not want AFDC. Between January 1982 and July 1984 executive branch officials commented on their proposals in testimony,

correspondence, and budget messages.[7] Not once during this entire process was there any mention of compulsory welfare or mandatory assignments. Only weeks after congressional approval had been obtained, however, HHS produced explicit regulations mandating the disputed practices.

The rules of statutory construction should take account of the difficulties often faced by Congress in framing legislation. Executive branch officials trying to win enactment of a contested piece of legislation, like any other

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[7] Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1984: Hearings before Subcommittee on the Department of Labor, Health, and Human Services, Education and Related Agencies, 98th Cong. 1st Sess. 528-529 (1983): Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1983: Hearings before Subcommittee on the Departments of Labor, Health, and Human Services, Education and Related Agencies, 97th Cong. 2d Sess. 572-573 (1982). J. App. 168-69.

lobbyists, are unlikely to warn that the measure might have a meaning which would increase opposition on the Hill. An unfortunate but undeniable part of relations between these two branches of government is that executive officials at times utilize their particular expertise and knowledge to frame proposals, statements and testimony which, although not literally inaccurate, may convey to a busy Congress an impression somewhat at odds with the actual understanding or intent of those executive officials. The danger of such "misunderstandings" is particularly great in dealing with the Social Security Act, whose very terminology is "an aggravated assault on the English language, resisting attempts to understand it." Schweicker v. Gray Panthers, 453 U.S. at 43, n. 14.

Whatever the drafting problems posed by the Act itself, it is very easy to

articulate in ordinary English the construction which the government now wishes to place on section 602(a)(38). The Secretary of HHS was able to do so with ease and dispatch as soon as the statute was adopted; the Solicitor General explains that proposed construction with his usual clarity, and offers the Court a helpful "simplified example" to illustrate his meaning. But neither that straightforward construction nor that example was ever offered to Congress. Prior to September, 1984, executive branch officials systematically avoided referring either to compulsory AFDC or mandatory assignments of child support. It is of no importance that the words used by those executive officials might have carried a second meaning, apparent to the cognoscenti within the HHS bureaucracy, different than the understanding that would have been

conveyed to an ordinary member of Congress, for it is the understanding and intent of Congress that controls.

(5) Our view that section 602(a)(38) was intended to adjust the grants of actual recipients, rather than to conscript unwilling individuals onto the public assistance rolls, does not by itself provide a full explication of the meaning of the statute. There remains to be resolved what type of adjustment is authorized by the statute. Congress certainly did not intend to give HHS unlimited discretion to devise whatever draconian adjustment scheme would most severely slash AFDC grants. Neither the statute nor the relevant committee reports specify what sort of grant reduction is to occur under what particular circumstances. In light of the vague record, and of the much vetted differences between the legislative and

executive branches regarding the appropriate level of support for indigent recipients of federal aid, the Court must attempt to determine what type or types of grant reduction Congress could clearly have understood it was authorizing when it adopted section 602(a)(38).

We believe that section 602(a)(38) might plausibly be read to support either of two interpretations. First, it may be that, as the Solicitor appears to suggest, Congress was concerned that AFDC recipients in homes with supported children were less needy because they enjoyed the benefit of the economies of scale that occur in larger households. (U.S. Br. 29; cf. Lyng v. Castillo, 91 L.Ed.2d at 532-33). Although some expenses, such as clothing, school supplies, and public transportation, are largely individual, other expenses--particularly rent and utilities -- can

readily be shared, and are ordinarily lower per capita in a larger household. North Carolina AFDC practice quantifies the economies of scale that occur, providing for a lower per capita AFDC grant in larger families.[8] If the purpose of section 602(a)(38) was to require an economy of scale adjustment, that could be achieved simply by basing the grant on the per capita level appropriate for the total number of applicants and supported children in the

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[8] The per capita AFDC, the standard of need and payment standard in 1984 were as follows:

Persons In Household	Per Capita Standard of Need	Per capita Payment
1	$296	$148.00
2	194	97.00
3	149	74.50
4	122	61.00
5	107	53.50
6	96	48.00
7	88	44.00
8	80	40.00

J. App. 51-52, Tables 2 and 4.

household, rather than on the higher per capita level for a household including only the applicants.[9] This economy of scale reduction in the grant would "include" the non-needy children and their income in the "determination" of the per-capita need and grant, doing so in a manner which would "take into consideration" the economies of scale realized because of the incomes of those non-needy children.[10]

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[9] For example, prior to the adoption of section 602(a)(38) the grant for a parent of one child would have been $194, regardless of the number of non-needy children in the home. Under an economy of scale adjustment, the presence of one such non-needy child would lower the per capita payment level from $97.00 to $74.50, thus reducing the actual grant to $149. Similarly, if a mother and two needy children shared their home with two non-needy children, their grant would be reduced from $223 to $160.00.

[10] On this reading 42 U.S.C. § 602(a)(8)(A)(vi) would prohibit such an economy of scale reduction if the total child support received by children in the family was less than $50.

Section 602(a)(38) might be read, in the alternative, to mandate effective state measures to assure that any income of non-AFDC children which was in fact provided to AFDC siblings would be counted as income to those siblings. It is unlikely, however, that Congress intended to permit the state to count all of a non-AFDC child's income as income to the AFDC recipients in the household. Because any such deeming rule would violate the principle of availability, Congress has always spoken unambiguously when it wished to deny grant applicants the opportunity to prove that they were not actually receiving presumed income. The statute in Lyng, for example, expressly denied siblings the chance, afforded to unrelated individuals in a common home, to prove that they were not sharing the cost of preparing meals. See 91 L.Ed.2d at 534-35. Sections

602(a)(31) and 602(a)(39) establish specific fixed formulas for calculating the amount of steppprent and grandparent income which must be treated as available to AFDC recipients in the household. This Court found similar deeming authorized under the Medicaid Act because of a statutory provision permitting a state to "take into account the financial responsibility of any individual for any applicant or recipient ...[if] such aplicant or recipient is such individual's spouse." 42 U.S.C. § 1396a(a)(17)(D). Schweiker v. Gray Panthers, 453 U.S. 34, 44-46 (1981). Section 602(a)(38), on the other hand, contains no such express language permitting a departure from the principle of availability.

The circumstances leading to the adoption of section 602(a)(38) are strikingly different than those which

amendments in Lyng. The Congress that adopted the Food Stamp amendments was prompted by a substantial body of evidence, garnered in a series of House and Senate hearings, that Food Stamp recipients were fraudulently denying that they shared their food costs, and that individualized detection of that abuse was impracticable. Lyng v. Castillo, 91 L.Ed.2d at 534-35 and nn. 4-6; Brief for the Appellant, No. 85-250, pp. 18-19 and nn. 13-19. The Food Stamp amendments were a carefully considered legislative response, albeit a drastic one, to a clear and intractable problem. The legislative history of section 602(a)(38), on the one hand, contains no allegations of any similar abuse regarding the use of child support funds, and no suggestion that the detection of any such abuses would be so difficult as to require the type of rigid rule

involved in Lyng. Congress did not hold so much as a day of hearings regarding the practices of AFDC recipients residing with supported children. It seems unlikely that Congress would have resorted to the sort of harsh measure involved in Lyng in the absence of any evidence of an abuse requiring such a remedy.

The legislative history does not, as the Solicitor suggests, contain any congressional finding that AFDC recipients and supported children in the same household in fact pool all their income and use it to meet the expenses incurred by each of them. The passage of the Senate report on which the Solicitor places primary reliance explains:

> This change will ... ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole. (S.Prt. 98-169, at 980)

The Solicitor suggests that this sentence constitutes a finding that family members who "live together" generally or always "share expenses."[11] That might be a plausible interpretation if the report referred to family members "who live together, and thus share expenses." But the passage as actually written says something quite different, that the purpose of the statute is to "recognize" that income is available to a family as a whole if its members meet two distinct requirements, i.e., they both "live together" and "share expenses." It is difficult to read into this sentence an intent to count income as "available" to an entire family if its members do "live

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[11] The Solicitor also argues that the record in this case demonstrates that child support is generally diverted to AFDC recipients. (U.S. Br. 41 n. 14). The district court, however, found that the testimony relied on by the government showed that such diversions occurred, at most, in moments of "financial crisis." (N.C.J.S. A-64).

together" but do not "share expenses." Although the Solicitor also refers to several staff reports to the Senate Finance Committee, and to a letter from the Secretary of HHS to the Vice-President, neither type of document carries significant weight in ascertaining the intent of members of Congress itself. The Solicitor does not actually assert, for example, that Secretary Heckler's typewritten letter was actually read or relied on by members of Congress, or that it was ever referred to or quoted in the legislative history. Compare Teamsters v. United States, 431 U.S. 324, 351 (1977) (Justice Department statement placed in Congessional Record by floor managers of bill; See Watkins v. Blinzinger, 789 F.2d 474, 479 (7th Cir. 1986)("[T]he words of the staff are not the equivalent of statements in committee reports").

On this reading section 602(a)(38) would mandate the state to inquire into the manner in which AFDC parents are utilizing child support funds. To understand the significance of such a statutory requirements it is necessary to refer to the terms of the original 1971 decree in Gilliard v. Craig. Paragraph 3 of that injunction forbad state officials from crediting to AFDC recipients the income of others in the household "without first detrmining that such income is legally available to" the AFDC recipients. (N.C.J.S. A-110). Under the terms of the decree the critical issue was whether the income in question was "legally available" to the AFDC recipients, not whether it was available in fact. The language of the injunction, if read literally, appeared to preclude reducing an AFDC grant because a non-AFDC child in the home was receiving child

support that was not "legally available" to others in the household, regardless of how the funds were actually being spent. The 1971 opinion held that North Carolina could not, in calculating the AFDC budget of an applicant, consider the resources of a non-applicant whose income exceeded his or her standard of need, reasoning that such a non-applicant had to be disregarded because he or she had too great an income to be eligible for AFDC. The opinion made an exception for cases in which there was "parental consent" to inclusion of those resources but made no provision for non-applicants whose income was in fact being shared with actual AFDC applicants. (N.C.J.S. A-98).

This Court's 1972 decision affirming the opinion and order in Craig v. Gilliard, 409 U.S. 807, made the principles thus upheld binding throughout the country. Edelman v. Jordan 415 U.S.

651 (1974). Although the precise legal significance of that summary affirmance might have been fairly debatable, North Carolina, like other states, evidently proceeded on the assumption that child support, since not "legally available" to anyone else in the household, could not be considered no matter how it was actually spent. Between the issuance of the 1971 injunction and the 1984 implementation of the HHS regulations, North Carolina simply made no effort to ascertain how child support funds of non-recipients were in fact being used. This was not, as in Lyng, a case in which inquiries into family practices proved futile, but, rather, a situation in which such inquiries simply were not attempted.

Section 602(a)(38) could fairly be construed to forbid this practice of disregarding whether support funds were in fact being diverted to AFDC

recipients. On this reading the statute would direct the states at the least to subject child support payments to the same, often exacting scrutiny applied to other funds in the possession of the AFDC parent, requiring the parent to provide periodic reports regarding the manner in which those payments were being disbursed, and insisting on verification of an applicant's representations. A state which had reason to doubt the accuracy of those reports would have to invoke the same procedures available for resolving any dispute about the availability of income to an AFDC recipient. If an applicant or recipient failed to provide a state with relevant requested information regarding the disposition of support funds in her possession, the state could undoubtedly make an appropriate reduction in her grant.

The language of section 602(a)(38), as we suggested earlier, could plausibly be read either to mandate such inquiries and reductions or to require an economy of scale adjustment in the grants of AFDC applicants living with non-AFDC siblings. Under these circumstances, we believe that HHS should be accorded the discretion to decide which method to use in implementing section 602(a)(38).

(6) Section 602(a)(38), as the Solicitor construes it, would if constitutional override state law in a variety of ways. In North Carolina, as is true throughout the nation, state domestic relations law requires that support payments be spent "for the benefit of" the supported child, N.C. Gen. Stat. § 50-13.4(d), but section 602(a)(38), in the government's view, requires that about one third to one-half of those funds be spent to acquire

AFDC benefit for the child's parent and siblings. North Carolina law directs that the support payment be set by the state court at a level sufficient to meet "the reasonable needs of the child," N.C. Gen. Stat. § 50-13.4 (b), but §602(a)(38), as the Solicitor reads it, directs that the supported child actually receive only a fraction of the funds judicially determined to be necessary to meet those needs. The inescapable effect of the disputed HHS regulations is to strip state judges of the power to direct an award of child support to a child who happens to reside with siblings on AFDC; in such a case the child support will, as a practical matter, have to be shared with the siblings and custodial parent on AFDC, despite the contrary intent and direction of the state court which ordered that payment, and despite the terms of the North Carolina statute

authorizing child support orders. See Br. of Amicus Curiae of National Council of Juvenile and Family Court Judges.

Congress, we believe, has no authority to override state law in this manner. Nothing in the powers enumerated by Article I confers upon Congress the ability to adopt a general domestic relations law applicable to the population at large. "Nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to 'define' property in the first instance." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980). The detailed provisions of the Social Security Act are an exercise of congressional power under the Spending Clause; Congress undeniably has the ability to impose on willing participants in federal programs obligations which could not be extended

to the public at large. A requirement that supported children who want to receive AFDC assign their support payments to the government, to the extent that it might displace state domestic relations law, falls within the authority of Congress under the spending power. Cf. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). But where, as here, state domestic relations law governs the property rights of a child who neither wants nor needs federal assistance, it is difficult to see how the Spending Power could provide the Congress with any authority to displace those state rules.

This Court has repeatedly held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890). Federal statutes have

been construed to pre-empt state law in this area only if Congress has "positively required" the pre-emption of state law "by direct enactment." Wetmore v. Markoe, 196 U.S. 68, 77 (1904). "[P]re-emption is not to be lightly presumed." California Federal S. & L. Assn. v. Guerra, 93 L.Ed.2d 613, 623 (1986). State law will prevail in the absence of a "clear and manifest purpose" by Congress to override that state provision. Pacific Gas & Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190, 206 (1983). Nothing in the legislative history of section 602(a)(38) indicates any intent to override state domestic relations law, or any understanding that the proposed legislation might have such an impact. That history and the language of the statute suggest, at most, a desire to recognize misuse of support funds if and

when and when it actually occurred, not an attempt by Congress to require such violations of state domestic relations law.

Where a statute such as 602(a)(38) reasonably lends itself to two or more different interpretations, the law should be construed in a manner that avoids serious constitutional questions. We urge, for the reasons set out at length below, that the Solicitor's proposed interpretation of section 602(a)(38) would render it unconstitutional. The interpretation of the statute which we propose, on the other hand, would avoid those constitutional problems. If, as we urge, section 602(a)(38) is susceptible of a constitutional interpretation, such a construction would avoid the administrative problems that would arise if the statute were struck down and

Congress were required to enact a constitutional substitute.

II. THE APPELLANTS' PRACTICES WORK AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

This case turns on the interrelationship of two distinct and longstanding legal principles. This Court has repeatedly held, as the Solicitor General correctly observes, that the formula for allocating social welfare benefits ordinarily need meet only a rational basis test. Lyng v.Castillo, 91 L.Ed.2d 527 (1986). This Court has also insisted, however, most recently in Hobbie v. Unemployment Appeals Commission (No. 85-993, slip opinion February 25, 1987), that the government cannot, in providing such benefits, establish conditions which are themselves unconstitutional, or impose substantial and direct burdens on constitutionally protected activities.

Where, as in Hobbie, a social welfare program is operated in a manner which imposes such an unconstitutional condition, that restriction must be struck down, even though it might otherwise meet the minimal rational basis requirement of Lyng. Hobbie, slip opinion p. 5. The disposition of the instant appeal turns largely on whether the practices at issue merely reflect a reasonable attempt, as in Lyng, to ascertain the needs of benefit recipients, or whether those practices, as occurred in Hobbie, effectively condition the distribution of those benefits on the abandonment or violation of a substantive constitutional right.

A. Child Support Funds Are Protected by the Taking Clause

In North Carolina, as throughout the nation, child support funds are the private property of the supported child. North Carolina statutes provide that

child support payments are to be paid to the custodial parent "for the benefit of such child." N.C.Gen. Stat. § 50-13.4(d). In litigated support proceedings, the amount of the payment is carefully calibrated to meet the particular needs of the supported child, "including his or her health, education, and maintenance." N.C.Gen. Stat. § 50-13.4(c). Although support payments are ordinarily made to the adult who is the custodial parent, that parent

> is not the beneficiary of the moneys ... These monies belong to the children. [The custodial parent] is a mere trustee for them.... She cannot ... profit at the expense of the children.

Goodyear v. Goodyear, 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962). "It is a violation of a court order for a custodial parent to spend the child support on other children not designated in the child support order." (N.C.J.S.

A-43 to A-44, quoting affidavit of state court judge).[12] The federal Internal Revenue Code does not treat child support payments as income to the custodial parent, since that parent may use the funds only to meet the needs of the designated child, and cannot "spend the monies ... as she sees fit" for herself or third parties. Commissioner v.

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12 See also Scott v. Commonwealth of Pennsylvania, 46 Pa. Cmnwlth. 403, 406 A.2d 594, 596 (1979) (child support funds "belong to that [designated] child and not to other children or the mother); Ditmar v. Ditmar, 48 Wash. 2d 373, 374, 293 P.2d 759, 760 (1956) ("a mother has no personal interest in child-support money and holds it only as a trustee"); Watts v. Watts, 240 Iowa 384, 391,36 N.W.2d 347, 351 (1949) (child support payments "not the property of the [mother]. She was merely the custodian of the funds ...;" Rand v. Rand, 40 Md. App. 550, 392 A.2d 1149, 152 (1978) (child support funds must "be applied exclusively to the ascertained needs of the child ... not to any extraneous purposes"). Bourque v. Commissioner of Welfare, 6 Conn. Cir. 685, 308 A.2d 543, 546 (1972) (fact that support payments are made to mother does "not alter the fact that the benefits were for the use of the child.").

Lester, 366 U.S. 299 (1961).

The Solicitor appears to base his brief on the premise that the child for whom support payments are made has "no ... property right" "to ... prohibi[t] the mother from spending the money on anyone other than the designated child." U.S.Br. 33). If the Solilcitor or the Attorney General of North Carolina are suggesting that a custodial parent could legally use support funds intended for one child to purchase clothes for the child's brother, pay bus fares for the child's sister, or buy presents for a friend, they are plainly mistaken.

The effect on child support payments of the HHS regulations can readily be illustrated by a simple example. Under the 1984 benefit schedule, a mother such as Dianne Thomas with one child on AFDC would receive a monthly AFDC grant of $194. If the mother gave birth to or

acquired custody of a second child, and received support payments of $200 per month for that child, the mother would be required, on pain of forfeiture of her AFDC benefits, to assign the child support payments to the state, and to put the second child on AFDC. In return for this $200 which the state received each month, state officials would pass onto the mother the first $50 of that support payment, and provide an additional AFDC allotment of $29, for a total of $79.[13] The difference of $121 would be retained by the state as a net profit from the transaction. No matter how large the

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[13] Depending on the number of children who were previously receiving AFDC, the additional grant for the new child could be as little as $13. (J. App. 52).

The Solicitor General also suggests that by applying for AFDC, the supported child also receives Medicaid. (U.S. Br. 39). Medicaid is available in North Carolina, albeit on somewhat different terms, to children not receiving AFDC.

child support payment which is received by the state in a given month on behalf of a supported child, the state will not provide for the child in return more than a total of $79; the net difference is simply kept by the state.

This practice certainly has the trappings of the type of uncompensated taking which the Fifth Amendment prohibits. Although the initial seizure and diversion of support funds is made by the custodial parent of the child involved, that parent clearly acts at the direction and behest of the state. Cf. Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970). "The state . . . us[es] one set of children's needs as a lever to coerce a mother either to break her legal obligation to the child receiving child support or to see her other children go hungry without AFDC." (N.C.J.S. A-58). The consequences of

that threatened sanction are so catastrophic that virtually every mother in North Carolina agrees to do the state's bidding. If such a mother were directed, on pain of loss of AFDC, to seize the money of a stranger and turn it over to North Carolina officials, that seizure would unquestionably constitute state action; the seizure here is no different. It is of no constitutional significance that the funds are seized before they reach the child, rather than being physically taken out of the child's hands after receipt. Cf. Sniadach v. Family Finance Corp., 395 U.S. 377 (1969).

This arrangement is manifestly unlike the circumstances presented by Lyng; indeed, so far as we are aware it is unique even in the byzantine realm of welfare law. In Lyng, the respondents had applied for a federal benefit and

complained that the level of that benefit they received had been set at an unconstitutionally low level. Here the affected children, prior to 1984, were receiving no AFDC benefit; they were not then part of the AFDC program, and still prefer to continue to remain outside it. The money in dispute in this case is not, as in Lyng, government funds, but the private property of the supported children.

In the instant case the use of benefit conditions to work an apparent constitutional violation is, in one respect, even more egregious than in Hobbie. Ms. Hobbie was only being asked to sacrifice her own constitutional rights in order to receive a government benefit; if she had chosen to relinquish the right to keep the Sabbath on Saturday, it would at least have been of her own choice, and she would in return

have escaped the financial penalty imposed by the state. Here, on the other hand, a threatened denial of benefits is used to conscript AFDC mothers to act as ad hoc state agents, directed to violate the constitutional rights of children who are given no choice and who receive nothing in return. It is as though, in Hobbie, Florida had withheld unemployment compensation from any parent who permitted his or her children to keep the Sabbath on Saturday. Such a rule, as here, would work a direct constitutional violation, rather than merely impose an unconstitutional condition. Adickes v. S.H. Kress & Co., supra.

In defense of this practice the Solicitor General makes two distinct types of contentions. First, he offers arguments which, if sustained, would render constitutional the seizure of child support funds in the manner at

issue even if the child was not living with a parent and indigent sibling receiving AFDC. Second, the Solicitor contends that, even if such a seizure would be unconstitutional as applied to the general population, the seizure is permissible where it occurs as a result of conditions imposed on the receipt of AFDC.

B. The Constitutionality of the Obligations Imposed by Appellants' Practices

There would seem to be little doubt as to the unconstitutionality of any statute which, in order to subsidize a state's AFDC program, simply expropriated one half of all child support payments paid to any child in the general population. Such a confiscatory scheme would be precisely the sort of practice condemned by the Taking Clause, "forcing some people alone to bear burdens which, in all fairness, should be born by the

public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The Solicitor General does not expressly suggest that, as a means of defraying the cost of AFDC, Congress or North Carolina could simply expropriate a substantial portion of all child support payments received by any minor in the state. But the Solicitor advances several arguments which, if credited, would compel the conclusion that such a scheme would indeed be constitutional.

The Solicitor urges, first, that "the 'economic impact' of the challenged legislation ... is not so great as to effect a taking." (U.S.Br. 37). He observes, for example, that the amount of money taken from any single child is far smaller than the economic injury sustained by the owners of the gold mines at issue in United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)

(U.S.Br. 37-38 n. 10). To some Americans the seizure of $50 or $100 a month might indeed seem relatively minor; it is undeniably smaller than the amounts of property at issue in previous Taking Clause cases. But for the indigent and the working poor, many of whom are surviving on a per capita monthly income of little more than $100,[14] the seizure of even a modest amount can be catastrophic. As a result of the seizure and retention of the child support funds at issue, the mothers in the instant case have been unable to buy shoes and clothes for children who prior to October 1984 were receiving at least a subsistence level of child support.[15] What may seem a pittance to the affluent may well be a necessity for the less fortunate.

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[14] See N.C.J.S. A-13 to A-29.

[15] N.C.J.S. A-16, A-22, A-30; see also id. at A-16 (no phone service), A-25 (no toys, car seat or high chair).

The Taking Clause, which safeguards the mansions of the rich and the factories of the wealthiest of corporations, protects with equal vigilance the pennies of the poor.

The Solicitor suggests, in the alternative, that any negative economic impact may be only an occasional unintended effect of a benign government practice. The $50 set aside, he asserts, was adopted because "the child support assigned to the state in consequence of the new filing-unit provision might sometimes be greater than the marginal increase in AFDC benefits obtained by the family by filing as a larger unit." Any net loss of child support, he suggests, was merely a "potential disadvantage" of the 1984 legislation. (U.S.Br. 14) (Emphasis added). This innocuous characterization of the regulatory scheme is wholly inconsistent with the

Solicitor's argument that the very purpose of section 602(a)(38) was to bring about a net loss of child support to the affected children, and a corresponding gain for the state and federal governments.

The Solicitor also contends that the challenged practices do not constitute a taking because, although North Carolina does not pass on to each child the full amount of the support payment which the state obtained, the state does return an amount "that reflects the needs of the child." (U.S.Br. 39). This would indeed be a compelling argument if the constitutional principle embodied in the Taking Clause were that the government may take from each according to his ability, so long as it provides to each according to his needs. Under such a doctrine, North Carolina might well choose to expropriate all child support

funds in the state and disburse to each affected child an equal monthly stipend. The North Carolina practice of demanding assignment of a minor's child support matches with harsh exactness the child's ability to pay; the grant which the child receives in return "reflects," but does not purport to meet, his or her essential needs, since the grant equals less than one third of the federal poverty level. But while there are undeniably jurisdictions which believe that property should be confiscated in proportion to each individual's ability to pay, and redistributed according to each person's particular needs, that does not happen to be the view of private property embodied in the Taking Clause.

Even if the seizure of these funds constitutes a taking, the Solicitor argues that the affected child receives "just compensation" because, in addition

to a monthly stipend of $79 or less, the child enjoys the benefit of government aid in collecting the child support. Although the child forfeits all but $50 of the funds collected each month, the state assumes "the burden of pursuing non-custodial parents who fail to satisfy their support obligations." (U.S.Br. 39). In addition, the Solicitor notes, the child is guaranteed an additional allotment, in practice between $13 and $29 a month, "regardless of the state's ability to collect from the absent father." (Id.). The Solicitor General professes incomprehension that the district court failed to grasp the fairness and generosity of this seemingly beneficent plan. (U.S.Br. 37). If such an ostensible fee-for-service scheme were constitutional, a state could indeed treat all children in this way, regardless of whether their siblings

happened to be on AFDC.

A state could certainly establish an optional child support service with fees reasonably related to the cost of collection. Federal law in fact requires North Carolina to offer just such assistance, on a voluntary, at cost, basis, and that program is undoubtedly constitutional. 42 U.S.C. §§ 651 et seq. But the practices at issue here, even as the Solicitor characterizes them, require participation by many parents and children who neither need nor want government help in collecting child support, and impose a fee - typically all amounts collected in excess of $50-$80 per month -- which would make a robber baron blush. In August, 1985, for example, North Carolina took from Arvis Water's two youngest children $760 of an $810 check; the compensatory service which the state provided in return was

the assistance of AFDC officials in cashing the $810 check which the state had received from the clerk of the Bronx Supreme Court. (N.C.J.S. A-27). Check cashing is at times a useful service, and its value might reasonably be considered, as the Solicitor suggests, in deciding whether just compensation has occurred. But a fee of $760 for cashing an $810 check is rather higher than the fair market value for that service.

Even if the seizure of child support payments to subsidize AFDC is a taking, the Solicitor suggests that the only appropriate remedy may be individual civil actions for just compensation, rather than a class action to enjoin the taking. (U.S. Br. 40 n. 13). We are not entirely sure that this is a serious suggestion. The number of affected class members in the instant case between 1984 and 1986 was more than 26,000; nationally

the total number of individuals whose funds are being seized each year is far larger. It seems unlikely that the United States believes that either the federal or state courts are capable of handling such a volume of litigation, or that the purposes of federalism would somehow be well served if this Court were to inflict such a burden on the courts of North Carolina, rather than sustain the simple injunctive remedy ordered by the district court below.

C. The Constitutionality of Imposing Such Obligations As A Condition of AFDC

The fact that the North Carolina could not directly impose the obligations and restrictions inherent in the disputed AFDC rules is not, of course, dispositive of this litigation. Where an otherwise impermissible government requirement or practice occurs in the context of a social welfare program, that context may

provide a justification inapplicable to the public at large. The regulations and contours of any social welfare program will inevitably discourage certain private conduct and encourage other; those incentives and disincentives will not in every instance be so direct and substantial as to be equivalent to a direct government command or prohibition. Lyng v. Castillo, 91 L.Ed.2d at 527.

(1) The Solicitor General contends that no actionable taking has occurred in this case because "participation in the AFDC program is entirely voluntary." (U.S. Br. 35). The Solicitor argues:

> Congress may attach reasonable conditions to participation in such programs. When a person voluntarily complies with such conditions in order to gain access to public benefits that he desires, there is no "taking" of his property. (U.S. Br. 35) (Emphasis added).

The manifest difficulty with this argument is that the individuals who want

to participate in AFDC, and the individuals whose property is being seized, are simply different people. It is the mother and indigent child who "desire" "to gain access to public benefits"; the property being seized, on the other hand, belongs to the supported child. The mother has absolutely no choice but to do the state's bidding; if the mother refuses, she and her indigent child will be denied even the absolute necessities required for survival. The HHS regulations impose on the mother a Sophie's choice, requiring her to choose to sacrifice the financial interests of one child in order to protect the interests of the others. "The falsity of the freedom of the mother, whose options are either to reduce one child's child support income or to cut her other children off from their sole source of support, AFDC, is painfully clear."

(N.C.J.S., A-50).

Having thus conscripted the mother into acting as an agent of the state, North Carolina requires her to deliver to the state child support funds which she holds, not as her own property, but on behalf of the supported child. The supported child, of course, does not consent to anything; the mother, who is supposed to disburse the child support funds for the support of that child, has in reality been compelled to disburse the funds for the support of the North Carolina Department of Human Resources.

The essentially coercive nature of this scheme readily distinguishes it from the allocation formula upheld in Lyng v. Castillo. In Lyng, respondent Castillo and his wife moved into the home of the wife's daughter, Teresa Barrera. When the Castillos applied for Food Stamps, the allotment provided to them was set at

a lower level because they were living with the Barreras. This Court upheld that reduced allotment as reasonably reflecting "the economies of scale when people buy and cook their food together." 91 L.Ed.2d at 534. But the Barreras were placed under no legal obligation either to feed the Castillos or to subsidize the Food Stamp program; so far as appears from the opinion in that case they did neither.

Lyng would have resembled the circumstances of this case only if Food Stamp officials had required the Castillos, as a condition of receiving benefits, to seize and deliver to the state each month a specified amount of the Barreras' money. The cases would also be similar if in Lyng federal officials had given the Castillos a full allotment of Food Stamps, and then garnisheed Ms. Barreras' salary for an

amount equal to the savings the Castillos had theoretically realized by living at the Barrera home. But neither the Solicitor General nor this Court in Lyng suggested that the United States was entitled to seize the property of the Barreras simply because the Castillos had "voluntarily" applied for Food Stamps.

(2) The Solicitor asserts that "the child support ... assigned to the state is in effect 'returned' to the family in the form of AFDC benefits." (U.S. Br. 32). If this statement were literally true, of course, the instant litigation would never have arisen. The undisputed facts are that, with the exception of the $50 set aside and the $13-29 incremental allotment, "the family" does not receive any additional funds as a result of the mandatory assignment of child support payments.

The particular manner in which North

Carolina actually accounts for the child support funds of a conscripted AFDC recipient highlights the confiscatory nature of the transaction.[16] When Dianne Thomas reluctantly agreed to apply for ADFC for her son Sherrod, the state increased the AFDC grant by only $29. But the state then insisted that Sherrod's father was indebted to the state for $111.50, half of the total grant to Sherrod, his mother and his sister. If Sherrod's father were to make support payments of more than $111.50, however, North Carolina still would not return the difference to Ms. Thomas or her son; instead, the surplus would be allocated by the state to reduce the "debt" owed to the state by the father of Sherrod's sister.

(3) The Solicitor General, although

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[16] This procedure is described in the deposition of Dan Miles, pp. 24-29.

not directly denying that child support funds are the property of the designated child, insists that the custodial parent is not restricted to using the funds for items which the child "alone will be permitted to use." (U.S. Br. 33). An indigent child may of course wear clothes or play with toys purchased for an older supported sibling. Child support payments may be used to pay a fair proportion of necessarily shared expenses such as rent or utilities, thus reducing the expenses of the mother and indigent child. These are precisely the types of considerations which underlie the economies of scale described above, and they might well provide a basis for reassessing the needs of the mother and indigent child.

But the incidental conferring of such collateral benefits on others in the supported child's home is altogether

different from an expenditure to acquire items for the exclusive or primary purpose of benefiting the custodial parent or any family member other than supported child. Where support payments are made for a young boy, the money obviously cannot be spent for a blouse for his mother or a dress for his sister. A fortiori the mother cannot expend half of a child's support payments for the sole purpose of acquiring AFDC benefits for herself and her other children.

The state argues that it is in the "best interest" of a supported child for his or her custodial parent and siblings or receive AFDC; thus, the state suggests, a custodial parent may take child support intended for one child and use it instead to acquire AFDC for the parent and a different child. (N.C.Br. 13). Obviously any child benefits to some degree if relatives in his or her

household are better off; in that sense it could be said that it would be in the "best interest" of a child if his or her child support were used to support all the relatives in the home. But the purpose of designating the beneficiaries of a child support order is to specify which individuals are and are not to receive that support; the amount of such an order is calibrated to reflect the particular needs of the designated recipients alone. The very existence of such a designation is inconsistent with the state's suggestion that the "best interest" of a beneficiary could be construed to include assuring that his or her non-designated relatives are well clothed, fed and housed.

(4) The Solicitor contends that the constitutionality of the seizure which occurred in this case should be determined, not by the standards

applicable under the Taking Clause to a seizure, but by the less stringent standard which would be appropriate if North Carolina, rather than actually seizing the funds of the supported child, had chosen instead merely to reduce the AFDC grant to the mother and indigent child. This lesser standard, the Solicitor suggests, is appropriate because a hypothetical practice of reducing AFDC grants might have had "the same economic bottom line" as the seizure which actually took place. (U.S. Br. 34-35).

The Solicitor's argument would literally stand on its head a century of decisions construing the Taking Clause. Since at least 1872[17] this Court has held

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[17] Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872) (flooding of land); see also Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); (cannon fired over land); United States v. Causby, 328 U.S. 256, 261-62

that a government practice which has "the same economic bottom line" as a physical seizure of property must be redressed by just compensation. Not every limitation of land use constitutes a taking, but it has never been suggested that a physical seizure of property would fall outside the Fifth Amendment if the government were able to hypothesize a practice equally injurious to the owner which would not literally utilize such a seizure. Similarly, this Court noted in Hobbie that the denial of benefits in that case imposed "the same kind of burden on the free exercise of religion as would a fine imposed ... for ... Saturday worship." (Slip opinion, p.4). The conclusion compelled by that functional equivalence was that the denial of benefits was unconstitutional,

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(1946) (flight path less than 100 feet above land).

not that fining Saturday worshippers would be permitted by the Free Exercise Clause.

(5) In addition to the 19,000 class members affected by the outright seizure of child support funds, the benefits of approximately 3,000 AFDC recipients were terminated solely because those recipients resided with minor siblings who were receiving a substantial child support payment.[18] Prior to the adoption of the HHS regulations, for example, Mary Medlin and her two older children were receiving a grant of $223; her two younger children, who were not on public assistance, were living on a total of $250 in child support. In October 1984, Ms. Medlin, as directed by state officials, sought AFDC for the two younger children, and agreed to assign

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[18]List of Class Members, filed Decemer 11, 1986. See J. App. 16.

their support rights to the state; state officials then ruled that, because of the amount of that child support, all the children, as well as Ms. Medlin herself, were ineligible for AFDC. (N.C.J.S. A-18).[19] Under the HHS regulations, otherwise eligible AFDC applicants must be denied assistance if they reside with siblings whose child support payments, less the $50 disregard, are as great as the total AFDC benefit which would be paid to an applicant family composed of both the actual applicants and the supported siblings. In effect, HHS regulations require a state to act as though child support payments, which cannot legally be used to support either non-designated children or the custodial parent, were in fact income which the mother was free to spend on herself or

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[19]This determination appears to have mistakenly ignored the $50.00 disregard.

anyone else in the household. Neither appellant addresses the constitutionality of terminations made on this basis.

These terminations, we urge, are constitutionally indistinguishable from the taking which would occur if the state continued the AFDC benefits but expropriated an equal amount in child support payments. They are indistinguishable, not because the economic consequence to the state is the same, but because both schemes require the custodial parent to seize and misuse the child support payments of one child in order to assure to herself and the non-supported siblings the essentials which AFDC would readily provide if the supported child did not live in their home. This situation is quite unlike Lyng v. Castillo where, if the Castillos were denied Food Stamps, the Barreras could have chosen to refuse to make up

the loss with their own funds. Here the custodial parent whose benefits are terminated because of the presence of the supported child is herself in control of that child's funds. In such circumstances the custodial parent has literally no choice but to either misappropriate the support funds or, as did Ms. Medlin, surrender to another adult custody of the supported child.

Ms. Medlin would have been under similar pressures if North Carolina had had no AFDC program, just as Ms. Hobbie would have been subject to substantial economic pressures to work on her Sabbath if Florida had had no unemployment compensation program. But having a system of benefits generally available to the population as a whole, a state cannot carve exceptions which, as in Hobbie, burden constitutionally protected activities or which, as here, inexorably

and forseeably cause harms which the state itself could not constitutionally inflict.

It is difficult to explain the termination of AFDC in these cases except as the result of a deliberate effort to force the custodial parent to misuse the child support funds. The loss of AFDC occasioned by a termination is far larger than might be necessary to account for any additional income which the actual AFDC recipients might, prior to the termination, have been receiving in diverted child support funds. In September 1984, for example, the two supported children in the Medlin household were receiving $250 a month in child support, while Ms. Medlin and her two other children were receiving an AFDC grant of $233. Assuming, arguendo, that some support funds were being diverted to the AFDC recipients, only a small portion

of the support funds could have been involved; even if the funds were pooled, and the total of $483 were divided equally among the five members of the household, the net diversion to the AFDC recipients would have been only $56, far smaller than the $233 reduction that was actually made in their grant.

Similarly, the practice of actually expropriating support funds is too harsh to be explicable as an attempt to adjust for any diversion of support funds to voluntary AFDC applicants, since those funds are seized and retained even where the supported children have less support per capita than the AFDC recipients themselves. If Sherrod Thomas, for example, had been receiving $90 a month in child support, his income would have been lower than the $96 per capita grant to his mother and sister; under those circumstances, even if Ms. Thomas did

treat all the income as a pool, there would have been no net transfer to the two AFDC recipients. Yet despite that fact, under the HHS regulations North Carolina would still return to Sherrod only a portion of the child support which it received for him. The system is undeniably contoured to reduce to AFDC levels the standard of living of any individual who resides with an AFDC recipient, and to require that that individual's funds be exhausted supporting the recipient before any assistance is provided to anyone in the home.

Neither HHS nor North Carolina, we urge, could rationally base its allocation of AFDC funds on the assumption that all AFDC parents who receive child support for a non-AFDC child are unlawfully spending those funds on themselves and on non-designated

children. This is not a situation, as existed in Lyng v. Castillo, where the funds of the more affluent household members could legally be used to buy food for their indigent relatives; the Barreras were certainly free to assist the Castillos in that manner, and it might have been reasonable to assume that most people in the position of the Barreras would ordinarily do so. In the instant case, however, North Carolina law expressly forbade Ms. Medlin from diverting to herself or her indigent children the support payments that she was receiving for her non-AFDC children, and such a diversion would have constituted a violation of the court order pursuant to which most of the support was received.

The vast majority of Americans undoubtedly respect the commands of the laws of the states in which they reside,

and take seriously the terms of any applicable court order. The Solicitor's brief appears to contend that it is a matter of "common sense," based on "human experience," that parents on AFDC, unlike other citizens, would not respect the legal restrictions on child support funds in their possession. (U.S. Br. 22, 46). Such preconceived notions that poor people systematically disregard legal obligations respected by others are, we urge, insufficient to provide a rational basis for the disputed practices. North Carolina could not terminate all grants to existing AFDC recipients on the assumption that, because they were poor, they were probably violating the AFDC regulations; it is hardly more reasonable for the state to terminate a particular group of recipients by presuming the occurrence of misconduct that would violate both the AFDC regulations and

state domestic relations law.

The terminations are particularly unreasonable because, by assuming that every parent involved is violating North Carolina law, those terminations virtually compel that very abuse. Parents who are in compliance with state law are not accorded any opportunity to allege or demonstrate they are obeying the law. North Carolina need not, of course, close its eyes to the possibility that any group of AFDC recipients may have undisclosed income. Since AFDC parents who manage child support funds, like AFDC parents who work part time as bank tellers, have an opportunity not available to other recipients to obtain additional income, the state could subject those parents to particular scrutiny. Any state participating in the AFDC program may require recipients to provide essential material information,

and may terminate those families that refuse to do so. Consistent with that general practice, North Carolina could certainly insist that AFDC parents with control of child suppport funds to account for the use of that money; if the recipient failed to provide that information, the state could reduce or adjust the recipient's grant in an appropriate manner. But such a practice would be very different than a rigid rule framed on the premise that an entire class of AFDC recipients is systematically violating that law.

(6) Throughout his brief the Solicitor suggests, in words evocative of an earlier simpler time, that the people affected by the disputed practices should be regarded, not as individuals, but as members of a family. It is "the family" whose needs were reduced by child support, "the family" that voluntarily

applied for AFDC, "the family" which received the grant, and "the family" which thus "cannot be heard to complain of a 'taking'." (See, e.g., U.S. Br. 29, 36). The Solicitor General asks the Court, in the name of "the family," to uphold a practice which has the predictable and demonstrable effect of driving mothers to relinquish custody of their children, deterring fathers from making essential child support payments, provoking hostility and even violence between the parents, and reducing already impoverished children to a state of absolute destitution.

The Solicitor's analysis conjures up the image of an idyllic home in which children live together with their common mother and father, in which the financial interests of all members are identical, in which any income is properly used to meet the needs of everyone, share and

share alike. But the related parents and children affected by the practices at issue in the instant case are in reality scattered among three or more separate, possibly antagonistic households. The vital nurturing relationship between parent and child, so vital to the well being of both, continues, but it is subject to extraordinary strains and pressures. The nuclear family has been torn asunder by divorce or abandonment, and complicated by prior or subsequent relationships and children. Under such circumstances, financial resources and support obligations, matters ordinarily dealt with through mutual agreement within traditional unified families, must be specifically allocated and regulated by state domestic relations law. To pretend that this is not occurring, or that it is somehow unnecessary, would inevitably be to worsen an already

difficult situation.

III. THE APPELLANTS' PRACTICES UNCONSTITUTIONALLY BURDEN FUNDAMENTAL RIGHTS

Lyng v. Castillo mandates a two-part analysis where a government practice is challenged because it allegedly burdens a fundamental right. First, the Court inquires whether the burden "directly and substantially" interferes with the protected activity, 91 L.Ed.2d at 533, quoting Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978). Where the burden is of that magnitude, it will be held invalid absent a particularly compelling state purpose which can be achieved in no other way. Zablocki v. Redhail, 434 U.S. at 388. Second, if the disputed practice does not directly and substantially burden the protected activity, the Court will consider whether the practice "is rationally related to a legitimate governmental interest." Lyng v.

Castillo, 91 L.Ed.2d at 533.

The district court properly regarded the decision of a parent and child to live together as among the fundamental rights to which this two-part analysis applied. Zablocki recognized that decisions regarding child rearing and family relationships were on "the same level of importance" as the decision to marry. 434 U.S. at 386. If a mother has a fundamental right to decide whether to give birth to a child, surely her decision to raise the child in her own home is entitled to equivalent protection. Id. The ability of parents to decide where their children will live is even more vital than their ability to decide where those children will go to school. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). "This Court has long recognized that freedom of personal choice in matters of ... family

life is one of the liberties protected by the Due Process Clause." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974). "[T]he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association" in a family's home. Smith v. Organization of Foster Families. 431 U.S. 816, 844 (1977). A state which imposed a fine on a child who lived with his or her mother would clearly violate this fundamental liberty; a similar constitutional violation exists where, as here, the state seizes a substantial portion of the child support funds of a child who lives with a mother and sibling on AFDC, but permits the child to retain those funds if custody of the child is given instead to father, grandparent, or non-relative. As the district judge observed, under the

disputed practices, "if a child wants to live with his ... mother and half-siblings, the child must surrender a right to private property, the right to ... money awarded to the child by state court order or voluntarily provided by an absent father." (N.C.J.S. A-62).

When the father and mother of a child do not live together, the existence of financial support from the non-custodial parent is often one of the few strands of a familial relationship that remains between that parent and the child. A prohibition forbidding a non-custodial parent to help feed, clothe or house his or her child would strike at the very heart of their parent-child relationship. (See N.C.J.S. A-72 to A-73). The disputed practices have the effect of virtually prohibiting a non-custodial parent from providing substantial financial assistance to his

or her child if that child resides with relatives on AFDC. North Carolina will expropriate all but the first $50 of any funds which a non-custodial parent tries to provide to such a child; if a father paying $50 a month increases his child support to $150 a month, the child whom he wishes to assist will not receive so much as a penny of that additional $100. The state has gone so far as to prosecute criminally a father who sought to avoid this expropriation by bringing his son food, clothing and diapers. (N.C.J.S. A-18 to A-20). The only way a non-custodial parent can assist such a child is by first providing to the others in the child's household support equal to their entire AFDC grant.

The Court has not attempted to formulate any mechanical rule for determining whether a burden imposed on a fundamental right is "direct" and

"substantial." In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court struck down a state law which forbade a noncustodial parent from marrying if he were subject to a child support order and was too poor to assure that the child at issue would not become a "public charge." In Califano v. Jobst, 434 U.S. 47 (1977), the Court sustained a federal statute which eliminated social security payments to most dependents who married. In Lyng the Court sustained a statute which reduced a family's Food Stamp allotment if it shared a home with certain relatives. Each of these decisions turned on the nature of the burden at issue and the circumstances under which it was imposed. Zablocki, Jobst and Lyng do suggest, however, that a number of considerations are particularly important.

First, the substantiality of an

alleged burden turns to a great degree on the magnitude and likelihood of the financial cost attached to the protected behavior. In Jobst, for example, the Court sustained a benefit scheme which had the effect, by shifting the married plaintiffs between programs, of reducing their per capita monthly grant by only $10. 434 U.S. at 57 n. 17; see also Zablocki, 434 U.S. at 387 n. 12. In Zablocki the Court struck down a scheme which forbade certain individuals from marrying unless they could provide their existing children with enough support to prevent them from becoming public charges. 434 U.S. at 387. In Lyng the challenged reduction in benefits imposed no net burden on most recipients, since it merely reflected the economies of scale they were experiencing by living with their relatives. In the instant case the amount of funds forfeited by a

child who lives with his or her mother equals about one third to one half of his or her child support; the dollar amounts are far larger than in Jobst. Here, unlike Lyng, the net financial loss to the supported children is not an incidental result affecting a few exceptional cases; the imposition of that loss is the very purpose of the challenged practice, and it is inflicted on all of the class members. The disputed practices bear even more heavily on the right of a non-custodial parent to assist his or her child; with the exception of the $50 set aside, all such support is ordinarily expropriated by the state and never reaches the intended recipient. The burden here on the non-custodial parent who wishes to support his or her child is literally several times greater than the burden on the father who wished to marry in Zablocki.

In Zablocki the father could not marry unless he supported at the public assistance level his existing child; here the non-custodial parent who wants to assist such a child cannot do so unless he or she first supports at that level every other child who lives in his own child's home, even though those other children are not related to him.

Second, the Court's decisions consider whether the burden is likely to actually deter those affected from engaging in the protected activity. In Jobst there was no evidence that the challenged statute had ever discouraged anyone from marrying, Zablocki 434 U.S. at 387 n. 12; in Lyng the Court held that it was "exceedingly unlikely" the disputed statute would deter relatives from living together, since the rental cost of separate housing would ordinarily far outweigh any loss in Food Stamps. 91

L.Ed.2d at 533. In the instant case, on the other hand, there is undisputed evidence that mothers have sent their supported children to live with other relatives in order to avoid forfeiture of much of the child's support payments. (J.App. 58). As reluctant as a mother would ordinarily be to surrender custody of a child, from a material perspective the child will undeniably be better fed, clothed and maintained living on $200 with its grandparent or father than living on $79 with its mother. The potential difference in the standard of living such a child would enjoy would necessarily weigh heavily in a mother's decision. The testimony is equally clear that the practice of expropriating all child support over $50 necessarily discouraged non-custodial parents from seeking to provide such assistance; indeed, it would be simply irrational for

a parent who wished to provide such support to actually attempt to do so, since the state is certain to intercept and retain the proferred financial assistance.

Third, the Court has been more willing to overturn a practice whose burdens fall with especial harshness on the indigent. In Jobst, the statute at issue imposed the same financial burden on all Social Security recipients, rich and poor alike, except in the case of marriages between two disabled recipients, on whom no burden was imposed at all. 434 U.S. at 52-53, 54-58. In Lyng, the complete loss of Food Stamps was limited to recipients who moved in with affluent relatives; those living with indigent relatives merely faced an economy of scale reduction. But in the instant case, as in Zablocki, the burden never applies when all the individuals

involved are affluent. If a child receiving $200 a month in support moves in with a mother and sibling living in a mansion in the suburb of Raleigh, the state does not take so much as a nickel of the child's support payments. But if an otherwise identical child moves in with a mother and sibling living on AFDC in a downtown housing project, the child must forfeit to the state a significant portion of his or her support payments. This practice, which places the disputed burden only on children whose siblings and custodial parent are "public charges," cannot readily be distinguished from the practice in Zablocki which burdened only parents whose children were "public charges." See 434 U.S. 404-05. (Stevens, J., concurring). Similarly, although the practice of seizing support funds precludes most non-custodial parents from assisting a child who lives

with AFDC recipients, a non-custodial parent rich enough to support the entire household may, after doing so, provide whatever aid he or she pleases to his or her own child. If Sherrod Thomas' father wants to resume supporting his son, for example, he must first provide $194 a month for the two AFDC recipients in Sherrod's home (See N.C.J.S. A-14). To the right of a non-custodial parent to support his or her child North Carolina attaches a price which only the very affluent could afford.

The burden on the ability of a mother and child to live together is the same regardless of whether the state seizes a substantial portion of the support funds, thus penalizing the child, or reduces or terminates the AFDC grant by an equal amount, thus penalizing the mother. This constitutional problem, like that occasioned by the virtual

prohibition of support by a non-custodial parent, is removed if the state bases its treatment of this situation on a requirement that each AFDC parent provide an accounting of how she uses child support funds, and restricts any reduction or termination of benefits to those cases in which such an accounting is not provided, or in which the state concludes that support funds are in fact being diverted to AFDC recipients.

IV. THE DISTRICT COURT PROPERLY ORDERED THE STATE APPELLANTS TO RETURN FUNDS SEIZED OR WITHHELD IN VIOLATION OF THAT COURT'S 1971 INJUNCTION

In addition to its decision regarding the meaning and validity of section 602(a)(38), the district court held that disputed conduct in this case had violated the injunction issued by that court in 1971 (N.C.J.S. A-7, A-78 to A-79). The district court ordered the state appellants to return to the class members funds which between October 1984

and July 1986[20] had been seized or withheld in violation of that previous injunction. (N.C.J.S. 124-26). This portion of the judgment below was expressly based only on the violations of the 1971 injunction, not on the district court's view regarding the constitutionality of the 1984 HHS regulations. (N.C.J.S. A-78). Accordingly, the correctness of the restitution provisions of the district court's order does not turn on the validity of section 602(a)(38) and should be addressed separately by this Court.

(1) The state appellants argue,

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20 In their district court stay application the state appellants agreed that, if the merits of the section 602(a)(38) issues were resolved against them, they would return all funds improperly seized or withheld after May 7, 1986, the date of the district court's decision. Memorandum of Law in Support of Stay Pending Appeal by the Defendants Third-Party Plaintiffs, p. 16 ("If plaintiffs ultimately prevail on appeal, their right to receive AFDC can be retroactively restored.")

first, that the practices which commenced on October 1, 1984, did not in fact violate the original 1971 decree. The 1971 decree provided that the North Carolina Board of Social Services and its employees were

> restrained and enjoined from directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income of one or more members of the family group without first determining that such income is legally available to all members of the family group.

(N.C.J.S. A-110).

The relevant facts are not in dispute. The state appellants do not, of course, deny that beginning in 1984 they directly or indirectly reduced AFDC payments to certain families because of the existence of child support payments. In 1971 that type of reduction was achieved by permitting a supported child

to retain his child support, but directly reducing the family's AFDC grant by an equal amount. (N.C.J.S. A-89 to A-90) In 1984-86 the state achieved a similar result in most cases by seizing part of the child support payment. In other cases state officials terminated all AFDC payments to recipients solely because they lived with children receiving child support. State officials expressly conceded that beginning in 1984 they made no effort to ascertain whether the seized funds were under state law "legally available to all members of the family group."[21] The state appellants do not deny that these practices, if engaged in before 1984, would have been a violation of the 1971 injunction.[22]

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21 Deposition of Kay Fields, pp. 43-46.

22 See, e.g., N.C.Br. 23 ("§602 ... now mandates the very conduct which the Gilliard v. Craig court said was violative of the Social Security Act.")

When section 602(a)(38) was first adopted, North Carolina officials candidly recognized that the 1971 Gilliard injunction forbade the very practices which federal officials were then proposing and which North Carolina subsequently implemented. An August, 1984, memorandum by state social services officials acknowledged that the 1971 injunction, unless modified, prohibited the sort of practices contemplated by the then proposed federal regulations:

> The effect of this law in Guilliard [sic] will depend on whether or not the new law supersedes the court order. If it does, Guilliard [sic] would be voided. If not, the State would be placed in much the same position as exists in Alexander v. Hill, i.e., either comply with a court order and lose compliance with Federal regs, or vice versa. (N.C.J.S. A-79).

The district court concluded that this memorandum demonstrated that the "[s]tate defendants were aware of the conflict

between the anticipated ... regulations and this court's outstanding order" (N.C.J.S. A-78); counsel for the state appellants does not challenge this factual finding that state officials believed they were in violation of the 1971 injunction.

In this Court, however, counsel for the state appellants now asserts that the district court's finding of a violation of the 1971 injunction is based on an incorrect interpretation of that earlier decree. In the instant case, the district judge who in 1986 allegedly misunderstood the 1971 decree is in fact the same judge who fifteen years earlier had drafted and ordered into effect that very injunction. The district court's interpretation of its own orders is certainly entitled to considerable weight.

The state appellants assert that the

1971 decree merely directed them to obey the Social Security Act itself. (N.C.Br. 16-23; N.C.J.S. 15). Since the 1984 legislation amended that Act, the state argues, the meaning of the injunction changed as well. Far from violating that earlier decree, these appellants assert, "in effect, the State Defendants indeed were following the original 1971 injunction by modifying their actions in compliance with the amended directives of the Social Security Act." (N.C.J.S. 15). This argument simply flies in the face of the literal language of the 1971 injunction, which includes no reference whatever to the Social Security Act, but contains instead an unambiguous and unqualified prohibition against the very conduct which admittedly has been occurring since 1984.

The state appellants suggest the injunction should be construed to require

only compliance with the Social Security Act because, they now urge, the 1971 opinion on which the injunction was based had condemned the disputed practices solely because they violated the Act as then written. (N.C. Br. 17-20). If this interpretation of the 1971 opinion were correct, it might well have provided a basis for modifying the injunction of that year in light of subsequent, constitutional legislation. But the rationale of the underlying opinion cannot justify disregarding the unambiguous requirements of the injunction itself. It is, moreover, far from clear that the 1971 opinion rested solely on statutory grounds. Sixteen years ago, when Craig v. Gilliard was here on appeal to this Court, North Carolina construed the 1971 decision very differently than it does today, insisting that the 1971 opinion had

declared the practices at issue to be unconstitutional.[23] The dissenting judge in the 1971 decision also believed that the majority had reached its conclusion at least in part on constitutional grounds.[24] The 1971 majority opinion

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[23] The question which the state asserted was presented by the appeal in Craig v. Gilliard was "whether the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution were violated by the defendants reducing their AFDC benefits due to income received by a particular member of the Plaintiffs' family." Jurisdictional Statement, No. 71-1234, p. 4. The jurisdictional statement explained, "It is contended by the Defendant that the Court below committed error in ruling that the regulations used by the North Carolina Department of Social Services and the Mecklenburg County Department of Social Services violated the equal protection rights of plaintiffs." Id., pp. 9-10. The jurisdictional statement did not suggest that the alleged statutory violation was even an alternative basis for the district court's opinion.

[24] N.C.J.S. A-100, ("The majority ... proceeds to strike as violative of the equal protection clause, and in contravention of the Social Security Act ... North Carolina rule ... relative to ... A.F.D.C. ....").

invalidated the then disputed practices because they created "unfair discrimination" and worked "an unlawful appropriation of the funds of both" supported children and their non-custodial parents. (N.C.J.S. A-98). We do not suggest that reasonable people could not disagree about the rationale of the 1971 opinion; Judge McMillan subsequently expressed the view that the 1971 opinion was indeed based on the Social Security Act. (N.C.J.S. A-117). But any such dispute about the rationale and continued propriety of an injunction must be resolved by an appropriate court, not by the party to whom the commands of the decree are addressed.

The state appellants assert, in the alternative, that by adopting section 602(a)(38) "Congress made the 'determination' that child support income 'is legally available' to all members of

the family group comprising an AFDC standard filing unit." (N.C.Br. 24). The state appellants do not, however, point to anything in the legislative history of section 602(a)(38) in which Congress even considered, much less purported to make any decision regarding, the legal restrictions in North Carolina or elsewhere regarding the use of child support funds. The Solicitor General, although advancing an exceedingly expansive view of the legislative history of section 602(a)(38), does not purport to find in that history any hint that Congress intended to evaluate the legal principles controlling the use of child support funds in any of the fifty states participating in the AFDC program. Again, moreover, the language of the 1971 injunction requires that the defendant state officials themselves make a determination of whether particular

support funds were legally available to other family members under state law. The existence of a congressional "determination" might have provided a basis for modifying that injunction, but no such congressional action by itself could remove the obligations imposed by the 1971 injunction on the defendants themselves.

(2) Second, the state appellants argue that their obligation to comply with the literal commands of the 1971 injunction ended in 1984 when Congress adopted section 602(a)(38). Appellants do not merely suggest that they were entitled to return to court in 1984 and seek a modification or recission of the 1971 injunction, a proposition which we would not contest. Rather, these appellants argue that, once section 602(a)(38) was enacted, state officials were at liberty to at once disregard the

outstanding injunction, without first, or ever, seeking a change in that order. The mere adoption of that legislation assertedly "obviate[d] the necessity of the enjoined party following established procedures in petitioning the proper federal forum for relief." (N.C. Br. 26).

The state appellants' argument is inconsistent with the rule long recognized by this Court that when a court with jurisdiction over the relevant subject matter and parties issues an injunction, that order, no matter how unsound, must be obeyed until modified or reversed by a court having the authority to do so. A party which violates such an outstanding injunction may be punished for contempt regardless of whether the injunction at issue was improper or even unconstitutional. This rule is required by "respect for judicial process," and

applies to any person subject to the commands of a mandatory injunction, "however exalted his station, however righteous his motives." Walker v. Birmingham, 388 U.S. 307, 320-21 (1967). This Court has in the past required federal officials,[25] local officials,[26] union organizers,[27] and opponents of government discrimination[28] to continue to obey disputed injunctions, and to present to the appropriate court whatever objections they might have to the legality of any such order. The state officials in the instant case were subject to the same obligation.

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25 GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980).

26 Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 439-40 (1976).

27 United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947); Howat v. Kansas, 258 U.S. 181, 189-90 (1922).

28 Walker v. City of Birmingham, supra.

The state appellants do not suggest that disobedience to an outstanding injunction is permissible whenever a subsequent enactment raises questions about the rationale of that order, but assert that disobedience was permissible here because, with the enactment of section 602(a)(38), the 1971 injunction "no longer ha[d] any basis in the law." (N.C.Br. 26). But whether that 1984 legislation indeed eviscerated the rationale of the 1971 injunction can hardly be said to be crystal clear. Appellants' present analysis rests on its assertion that the injunction was originally based solely on appellees' statutory claim, a view which is precisely the opposite of the state's original position. Even assuming that to have been the basis of the 1971 injunction, there was a respectable body of judicial opinion in 1985 and 1986

which rejected appellants' interpretation of section 602(a)(38).[29] Appellants undeniably had a colorable argument for a modification of the 1971 injunction, and a reasonable judge could conceivably have granted such relief. But in the resolution of such a request, as in all other areas of the law, "no man can be judge in his own case." Walker v. Birmingham, 388 U.S. at 320.

Appellants' deliberate violation of the 1971 injunction cannot be justified by their arguments that, had they sought a modification in advance of that violation, "it would have been an abuse of discretion for the district court to have denied the State's request." (N.C. Br. 25). "The proper procedure ... was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to

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[29] See U.S.Br. pp. 5-6 n.2.

its validity." Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 179 (1968). The ordinance underlying the injunction at issue in Walker v. Birmingham was unanimously held unconstitutional by this Court, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), but Reverend Walker, Dr. Martin Luther King, and their co-defendants still went to jail for violating that order.

A party subject to an injunction cannot disregard the commands of that decree merely because subsequent events, such as the enactment of relevant legislation, appear to undermine the original basis of the order. A similar sequence of events occurred in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). There, following the district court's issuance in 1970 of a school desegregation order, this Court

formulated a new set of guidelines for such decrees in Swann v. Board of Education, 402 U.S. 1 (1971). In 1974 the school board moved for modification of the decree in light of Swann, and this Court held that Swann required the requested change in the injunction. 402 U.S. at 432-38. The Court also made clear, however, that the board remained under a legal obligation to obey the 1970 injunction until it was modified by judicial action, "notwithstanding eminently reasonable and proper objections to that order." 427 U.S. at 439-40.

Neither Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855), nor System Federation v. Wright, 364 U.S. 642 (1961), permits a party to violate an outstanding injunction because of the subsequent enactment of legislation. Wheeling and System Federation establish

the "rules governing modification of ... a final decree ... by a court of equity," Spangler, 427 U.S. at 437, not rules permitting violation of such a decree by a contumacious litigant. In System Federation the union subject to the injunction at issue filed a motion for modification of that decree in light of the subsequent legislation, and pursued that request to this Court. 364 U.S. at 644-45. Wheeling has always been understood to establish "the power of [a] . . . Court to modify [a] decree", System Federation, 364 U.S. at 646, not to authorize violation of an unmodified injunction.

(3) In the district court, the state officials expressly acknowledged, correctly in our view, that they could be required to return the disputed child support funds if those funds had been seized or withheld in violation of the

outstanding 1971 federal injunction. They asserted in their memorandum on the Eleventh Amendment:

> Edelman v. Jordan holds ... that a federal court can require payment of state funds as "a necessary consequence of compliance in the future with a substantive federal-question determination." ... In light of Edelman ... the deciding question is what conduct did the court declare to be unlawful in its 1971 judgment.[30]

Based on this view of the law, the state officials did not urge the lower court to dismiss appellees' monetary claims under the 1971 injunction, but argued only that the court should dismiss any monetary claim "based on allegations that 42 U.S.C. § 602(a)(38) was unconstitutional."[31]

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30 Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss In Part Plaintiffs' Claim for Retroactive AFDC Payments, pp. 3-4.

31 Id., p. 7.

In this Court, on the other hand, the state appellants assert that the Eleventh Amendment guarantees impunity to a state which violates a federal court injunction. (N.C.Br. 35-36). On the appellants' view, the obligations established by the 1971 injunction, although prospective and thus enforceable when that decree was issued, somehow had become retroactive and thus invalid by the summer of 1986 when Judge McMillan sought to enforce them. The prospective terms of the 1971 decree required state officials to provide AFDC to Mary Medlin and her three indigent children in October, 1984 without regard to the support payments being made to Ms. Medlin's other child, Karen. Appellants concede that the original order was valid and enforceable, despite the Eleventh Amendment, when it was issued in 1971. But, they argue, once state officials

actually violated the decree by cutting off AFDC to the Medlins because of Karen's child support, any enforcement of the decree with regard to the grant for October 1984 became retrospective and thus impermissible under the Eleventh Amendment. Insofar as the 1971 decree applied to the grant to be paid Ms. Medlin for October 1984, appellants assert, the decree was rendered unconstitutional and unenforceable precisely because, and at the point when, state officials violated that decree. On this view the violation of a prospective decree automatically renders unenforceable the very legal obligation that was violated.

The Attorney General of North Carolina asks this Court not merely to overturn the award in this case, but to confer on the state the right to violate with impunity any "mere" federal

injunction with which the state happens to disagree. (N.C.Br. 36) A carefully considered and fairly litigated injunction solemnly issued by a court of the United States is dismissed as only "a judge-made decree" to which "a sovereign state" need pay little heed. (N.C.Br. 35). On this view the Eleventh Amendment was intended, not merely to repeal the citizen-state diversity clause of Article III, but to embody in the Constitution an immunity rule comparable to the doctrine of interposition openly advanced in the 1950's by states determined to disregard federal court decrees. On the Attorney General's view, the state would be free to violate with impunity an injunction issued by this Court against implementation of the disputed HHS regulations just as it violated the original 1971 injunction which had been affirmed by this Court.

In Hutto v. Finney, 437 U.S. 678 (1978), this Court made clear that the Eleventh Amendment does not confer on the states or state officials any such license to violate with impunity injunctions issued by the federal courts:

> In exercising their prospective powers under Ex parte Young ... federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties ... which compensat[e] the party who won the injunction for the effects of his opponent's noncompliance.... The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail.

437 U.S. at 691. Once state officials are under a "court imposed obligation to conform to a ... standard" of conduct, federal courts have plenary authority to issue whatever orders are necessary to bring about "compliance with decrees

which by their terms were prospective in nature." Edelman v. Jordan, 415 U.S. 651, 668 (1974). Hutto and Edelman make clear that a court's authority to issue a prospective injunction necessarily includes the power to correct the effects of subsequent violations of such a decree.

The state Attorney General insists that this view of the Eleventh Amendment in no way limits the "contempt power" of the federal courts. (N.C. Br. 42). But he offers no explanation of what he thinks the district judge should have done when it determined that the 1971 injunction had been violated. Appellants may be suggesting that the district judge could have found the state officials in contempt, and imposed a fine, payable from the state treasury, equal to the amount of child support payments expropriated or withheld in violation of

the 1971 injunction; but such an order would differ only in form from the order to which the state appellants object, and there would surely be no constitutional obstacle if the judge directed that the proceeds of such a fine be paid over to the very indigent parents and children from whom the money was originally taken. If the state objects to that use of the contempt power, the only other conceivable use of that power would be against the defendant officials who personally violated the 1971 injunction. But it is difficult to believe that what the Attorney General is proposing is that the district court in a case such as this should have, and on remand ought to, vindicate the authority of that court by imposing fines or a term of imprisonment on Phillip Kirk, the Secretary of the North Carolina Department of Human Resources, and his subordinates.

The order actually issued by the district court in this case requires the state appellants to do no more than was required by the original 1971 injunction itself. The state officials are obligated to disgorge only the particular funds seized or withheld in violation of the earlier injunction, and the funds are to be disbursed solely to the specific individuals who would have retained or received them had the injunction not been violated. (N.C.J.S. A-124). Although the violation of the injunction may have caused the class members significant consequential financial or emotional injuries (see, e.g. N.C.J.S. A-17), the decree does not mandate the payment of any compensatory damages to redress such harms. Neither does the order provide for pre- or post-judgment interest. The 1986 decree simply requires that the state appellants disburse exactly the

same amounts of money to precisely the same people as was already required by the prospective provisions of the 1971 decree.

Were this Court to adhere to the view of the Eleventh Amendment first espoused in Hans v. Louisiana, 134 U.S.1 (1890), affirmance of the order in this case would be required for the above reasons. But we do not advocate continued judicial efforts to explicate Hans. During the last two terms, four members of this Court have repeatedly urged that Hans should be overruled because that decision appears to be unwarranted by the history and origins of the Eleventh Amendment.[32] Hans remains in force only because a majority of the Court has preferred to postpone

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[32] Papasan v. Allain, 92 L.Ed.2d 209 (1986); Green v. Mansour, 88 L.Ed.2d 371 (1986); Atascadero State Hospital v. Scanlon, 87 L.Ed.2d 171 (1985).

addressing that issue. We believe it would be inappropriate to continue to refine the distinctions that grow out of Hans until the Court has reconsidered whether Hans itself is consistent with the intent of the framers of the Eleventh Amendment.

CONCLUSION

For the above reasons the judgment and opinion of the district court should be affirmed.

Respectfully submitted,

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